

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EVA A. RAMIREZ,

Plaintiff,

v.

OLYMPIC HEALTH MANAGEMENT
SYSTEMS, INC., a Washington
Corporation,

Defendant.

NO. CV-07-3044-EFS

**ORDER ENTERING COURT'S RULINGS
FROM DECEMBER 17, 2008 HEARING**

A hearing occurred in the above-captioned matter on December 17, 2008, in Richland. Plaintiff Eva A. Ramirez was represented by Kevan T. Montoya and Tyler M. Hinckley; Robert H. Bernstein appeared on behalf of Defendant Olympic Health Management Systems, Inc. Before the Court were several discovery motions and Plaintiff's Motion for Partial Summary Judgment. (Ct. Rec. 92.) After reviewing the submitted material, relevant authority, and hearing oral argument, the Court was fully informed and granted and denied in part the pending motions. This Order serves to memorialize and supplement the Court's oral rulings.

I. Background

Plaintiff Eva Ramirez is a Hispanic female who was hired on May 1, 2006, as an insurance sale person for Defendant and paid on commission. (Ct. Rec. 4 at 3.) Plaintiff alleges that Barbara Bloomfield, her immediate supervisor, discriminated against her by instructing the receptionist that Plaintiff should only receive Hispanic customers calling into the Yakima office. *Id.* at 4. Plaintiff complained to Katrina Borth, Defendant's regional manager, and eventually quit on September 11, 2006. *Id.* at 6. Plaintiff seeks damages for injuries caused by the alleged discrimination under Title VII and the Washington Law Against Discrimination, RCW 49.60 *et al.*

II. Discussion

A. Meet-and-Confer Requirement

Federal Rule of Civil Procedure 37 permits a discovering party to seek judicial intervention when an opposing party fails to cooperate in discovery. A prerequisite to judicial intervention is a certification "that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." FED. R. CIV. P. 37(a)(1).

Here, the Court finds Rule 37's meet-and-confer requirement was satisfied. The parties exchanged several written correspondences attempting in good faith to resolve the pending discovery disputes - each to no avail. The parties memorialized their efforts in a formal statement complying with Local Rule 37.1(b). (Ct. Rec. 117.)

B. Discovery Standard

A district court has wide discretion in controlling discovery. *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). Moreover,

1 pre-trial discovery is ordinarily "accorded a broad and liberal
2 treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

3 A party may object to a request for production, but the grounds for
4 objection must be stated with specificity. FED. R. CIV. P. 34(b)(2).
5 Absent a valid objection, the production of evidence can be compelled
6 regarding any matter "relevant to the subject matter involved in the
7 action" or "reasonably calculated to lead to the discovery of admissible
8 evidence." FED. R. CIV. P. 26(b)(1). This broad discovery right is based
9 on the general principle that litigants have a right to "every man's
10 evidence," and that "wide access to relevant facts serves the integrity
11 and fairness of the judicial process by promoting the search for truth."
12 *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).

13 In the same vein, "[d]istrict courts need not condone the use of
14 discovery to engage in 'fishing expeditions.'" *Rivera v. NIBCO, Inc.*,
15 364 F.3d 1057, 1072 (9th Cir. 2004) (citation omitted). Rule 26(c)
16 permits a court to enter a protective order when the party seeking the
17 order establishes "good cause" for the order and justice requires a
18 protective order to protect a party from "annoyance, embarrassment,
19 oppression, or undue burden or expense" The burden of
20 persuasion is on the party seeking the protective order. *Rivera*, 364
21 F.3d at 1064. To meet this burden, the party seeking the protective
22 order must show good cause by demonstrating a particular need for the
23 protection sought. *See id.*; *see also Caesars Entm't, Inc.*, 237 F.R.D.
24 428, 432 (D.C. Nev. 2006). Conclusory statements about the impending
25 harm or a showing that discovery may involve some inconvenience or
26 expense does not suffice to establish good cause under Rule 26(c).

1 *Turner Broadcasting System, Inc. v. Tracinda Corp.*, 175 F.R.D. 554, 556
2 (D. Nev. 1997).

3 **C. Defendant's Motion to Compel**

4 1. Walt Moro's E-Mail

5 Defendant asserts that Walt Moro's e-mail is discoverable because
6 Plaintiff cannot demonstrate that the work product doctrine applies.
7 (Ct. Rec. 77 at 2.) Defendant alternatively asserts that, even if the
8 e-mail is protected by work product, it has substantial need for the e-
9 mail in order to properly prepare for trial. Plaintiff responds that
10 the e-mail is work product and that Defendant fails to demonstrate
11 substantial need. (Ct. Rec. 90 at 4.)

12 When a discovery dispute turns on a work product protection claim,
13 the first question, naturally, is whether the protection applies. A
14 party seeking to invoke the work product doctrine must demonstrate that
15 the document or tangible thing was prepared (1) "in anticipation of
16 litigation or for trial" and (2) "by or for another party or by or for
17 that other party's representative." *United States v. Torf*, 357 F.3d
18 900, 907 (9th Cir. 2003). A document is prepared "in anticipation of
19 litigation" if "in light of the nature of the document and the factual
20 situation in the particular case, the document can be fairly said to
21 have been prepared or obtained *because of* the prospect of litigation."
22 *Id.* (citation omitted) (emphasis added). The "because of" standard
23 requires consideration of "the totality of the circumstances." *Id.* at
24 908; see also *Brantigan v. Depuy Spine, Inc.*, 2008 U.S. Dist. LEXIS
25 78052 at *8 (W.D. Wash. Sep. 12, 2008).

26 The work product doctrine does not protect facts concerning the
creation of work product, or facts contained within work product. See,

1 e.g., *In re Savitt/Adler Litig.*, 176 F.R.D. 44, 48 (N.D.N.Y. 1997)
2 (finding that plaintiffs' "work product" objections to interrogatories,
3 which requested facts supporting plaintiffs' contentions, were improper
4 because work product protection does not extend to facts); see also 6-26
5 MOORE'S FEDERAL PRACTICE - Civil § 26.70. The burden of establishing work
6 product protection lies with the proponent. *Brantigan*, 2008 U.S. Dist.
7 LEXIS 78052 at *8.

8 Here, the Court finds a written statement drafted by a non-lawyer
9 under these circumstances does not qualify as work product.
10 Nonetheless, assuming arguendo that the e-mail does constitute work
11 product, the next question is whether an exception to the work product
12 doctrine exists.

13 There are two (2) types of work product: fact work product, i.e.,
14 "written or oral information transmitted to the attorney and recorded as
15 conveyed by the client"; and opinion work product, i.e., "any material
16 reflecting the attorney's mental impressions, opinions, conclusions,
17 judgments, or legal theories." *In re Columbia/HCA Healthcare Corp.*
18 *Billing Practices Litig.*, 293 F.3d 289, 294 (9th Cir. 2002) (citations
19 and quotation marks omitted). The protection accorded fact work product
20 can be pierced when the opposing party demonstrates substantial need for
21 the information and cannot otherwise obtain its substantial equivalent
22 without undue hardship. See *Torf*, 357 F.3d at 906 (quoting Rule
23 26(b)(3)) (internal alterations and quotations omitted).

24 The Court finds that 1) Mr. Moro's e-mail constitutes "fact work
25 product," 2) Defendant has shown substantial need for Mr. Moro's e-mail,
26 and 3) Defendant cannot obtain Mr. Moro's e-mail without undue hardship.

1 This e-mail is fact work product because it does not contain
2 Mr. Montoya's "mental impressions, opinions, conclusions, judgments, or
3 legal theories," see *In re Columbia/HCA Healthcare Corp. Billing*
4 *Practices Litig.*, 293 F.3d at 294; instead, it contains several facts
5 relating to Plaintiff's alleged discriminatory treatment while working
6 for Defendant. Moreover, Defendant has shown substantial need¹ for Mr.
7 Moro's e-mail because it is plainly relevant and necessary for trial
8 preparation. And finally, Defendant has shown undue hardship because it
9 made several unsuccessful attempts to obtain the e-mail from Mr. Moro.
10 (Ct. Rec. 78, Ex. J.)

11 Plaintiff insists Defendant can obtain the same information by
12 deposing Mr. Moro. This position is unpersuasive. First, Defendant
13 cannot depose Mr. Moro about an e-mail he cannot remember. Second,
14 Plaintiff's argument ignores that the Federal Rules of Civil Procedure
15 exist in part to "secure the just, speedy, and *inexpensive* determination
16 of every action and proceeding." FED. R. CIV. P. 1 (emphasis added).
17 Forcing Defendant to engage in unguided discovery and fish for answers
18 about the e-mail seems inefficient and unnecessarily runs up litigation
19 costs. See *Dobbs v. Lamonts Apparel*, 155 F.R.D. 650, 652 (D. Alaska
20 1994). Third, the Supreme Court's long-standing position is that
21 "[m]utual knowledge of all the relevant facts gathered by both parties
22 is essential to proper litigation." *Hickman*, 329 U.S. at 507. Fourth,

23
24 ¹The Court is mindful that Defendant's "substantial need" is, to a
25 degree, speculative. That is, because Defendant does not know the e-
26 mail's contents, it can only speculate that the e-mail contains relevant
information necessary for effective trial preparation.

1 Defendant is not attempting to "cut corners" by exclusively relying on
2 Plaintiff's discovery leg work because it will likely depose Mr. Moro
3 about the topics disclosed in his e-mail in preparation for trial. In
4 sum, Mr. Moro's e-mail is discoverable.

5 2. Privilege Log

6 Defendant argues Plaintiff failed to file an adequate privilege log
7 explaining Mr. Moro's e-mail. (Ct. Rec. 77 at 5.) Plaintiff insists
8 she disclosed enough information for Defendant to assess the privilege
9 assertion's merits. (Ct. Rec. 90 at 5.)

10 Rule 26(b)(5) requires a party withholding discovery to create a
11 privilege log. Privilege logs need not adhere to a particular format.
12 *See Burlington N. & Sante Fe Ry. v. United States Dist. Court*, 408 F.3d
13 1142, 1149 (9th Cir. 2005). Nevertheless, privilege logs must contain
14 sufficient detail for the opposing party to adequately assess the
15 privilege or protection's applicability. Such detail includes:

- 16 1) the document's general nature and description, including its
17 date, the author's identity, and all the recipients'
18 identities;
19 2) the document's present location; and
20 3) the specific reason it was withheld, including the privilege
21 invoked and the grounds therefor.

22 *Allen v. Woodford*, 2007 U.S. Dist. LEXIS 11026, *4 (E.D. Cal., Jan. 30,
23 2007); *Thomas v. Hickman*, 2007 U.S. Dist. LEXIS 95796, *12 (E.D. Cal.,
24 Dec. 6, 2007); *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th
25 Cir. 1992).

26 The Court finds that Mr. Montoya's "informal" privilege log is
insufficient. As an initial matter, Mr. Montoya never explicitly

1 informed Defendant that his refusal to disclose the e-mail - and brief
2 description why - constituted a privilege log. This caused unnecessary
3 confusion. It is true that Mr. Montoya, in his written correspondence
4 with defense counsel, identified the e-mail's date, the author's
5 identity, and a cursory explanation why it was withheld from discovery.²
6 This is not enough. Mr. Montoya also needed to include who received the
7 e-mail and a more detailed description of the e-mail's contents.
8 Without such knowledge, Defendant is left in the dark on whether
9 Plaintiff's work product assertion is meritorious. The Court instructs
10 the parties that all future privilege or immunity assertions must be
11 accompanied with sufficient support.

12 **D. Plaintiff's Motion to Compel; Defendant's Protective Order Request**

13 1. General Objections

14 For the reasons articulated on the record, the Court declines to
15 strike Defendant's general objections.

16 2. RP Nos. 1-6, 11-19, 24, 26-27, 29-31, & 34-35

17 ____ For the reasons articulated on the record, the Court declines to
18 strike Defendant's objections to RP Nos. 1-6, 11-19, 24, 26-27, 29-31,
19 and 34-35. The Court treats Defendant's answers - and the documents
20 produced in connection with its answers - as full and complete responses
21 based on Mr. Bernstein's representation as an officer of the Court and
22 as authorized representative for Defendant.

23 ///

24 ///

25 _____
26 ²Mr. Montoya offered the following one-sentence explanation: "It's
work product."

1 3. RP Nos. 7-10

2 ____For the reasons articulated on the record, the Court strikes in
3 part Defendant's objections and grants in part Defendant's protective
4 order request with respect to RP Nos. 7-10. As drafted, Plaintiff's RPs
5 are far too broad. Accordingly, Defendant shall produce the following
6 documents within its custody and control from May 2006 thru December
7 2006: 1) all documents showing Ms. Borth's *work schedule*; 2) all
8 *business* call records for Ms. Borth; 3) all *business* call records for
9 Ms. Bloomfield; and 4) all e-mails exchanged between Mses. Bloomfield
10 and Borth.

11 4. RP Nos. 20-22

12 ____For the reasons articulated on the record, the Court declines to
13 strike Defendant's objections and grants Defendant's protective order
14 request with respect to RP Nos. 20-22. As to RP Nos. 20-21, romantic
15 relationships between non-parties is irrelevant to the present
16 litigation and invasive of privacy interests. As to RP No. 22,
17 Ms. Borth's expense receipts are unnecessary because 1) Defendant
18 acknowledges that Ms. Borth met with the Yakima staff over dinner and 2)
19 expense receipts will not reveal the dinner discussion's contents -
20 depositions will.

21 5. RP No. 23

22 ____For the reasons articulated on the record, the Court strikes in
23 part Defendant's objections with respect to RP No. 23. This request is
24 proper because it could conceivably support a claim that Ms. Borth did
25 not adequately respond to Plaintiff's legitimate discrimination
26 complaints. Accordingly, Defendant shall produce all expense documents

1 and records within Defendant's custody and control from May 2006 thru
2 December 2006.

3 6. RP No. 25

4 ____For the reasons articulated on the record, the Court declines to
5 strike Defendant's objections and grants Defendant's protective order
6 request with respect to RP No. 25. James Benedict is relevant in this
7 case because he works for Defendant and allegedly apologized to
8 Plaintiff for discriminatory comments made by her co-workers. This
9 conversation, however, occurred on the telephone. Thus, expense
10 receipts regarding Mr. Benedict's travel are not relevant.

11 7. RP No. 28

12 ____For the reasons articulated on the record, the Court strikes
13 Defendant's objections to RP No. 28. The requested information is
14 conceivably relevant and Defendant's proprietary information disclosure
15 concerns are assuaged by the existing Protective Order. (Ct. Rec. 13.)

16 8. RP Nos. 32-33

17 ____For the reasons articulated on the record, the Court declines to
18 strike Defendant's objections and grants Defendant's protective order
19 request with respect to RP Nos. 32-33. Defendant represents it
20 previously produced a corporate "chain of command." Accordingly,
21 producing all corporate minutes for a two-year period demonstrating the
22 same is irrelevant and unduly burdensome. Additionally, Aon is not a
23 party so there is no reason by Plaintiff needs to understand its chain
24 of command.

25 ///

26 ///

1 9. Rule 30(b)(6) Depositions

2 _____i. Topics 1-2, 8-10, 19-21

3 For the reasons articulated on the record, the parties are
4 instructed to confer regarding what parts of Ms. Borth's deposition will
5 be adopted by Defendant as binding under Rule 30(b)(6). Plaintiff is
6 permitted a one (1) hour follow-up Rule 30(b)(6) deposition to cover
7 this topic and others articulated in this Order.

8 _____ii. Topics 6-7

9 For the reasons articulated on the record, these deposition topics
10 are barred because they are irrelevant and invasive of privacy
11 interests.

12 iii. Topics 11-18

13 For the reasons articulated on the record, Plaintiff is permitted
14 a one (1) hour follow-up Rule 30(b)(6) deposition to cover all topics
15 Jeffrey Lintner was not able to answer.

16 **III. Conclusion**

17 Accordingly, **IT IS HEREBY ORDERED:**

18 A. Defendant's Motion to Compel Discovery (**Ct. Rec. 76**) is **GRANTED**
19 (Moro e-mail discoverable) **AND DENIED** (fees) **IN PART**.

20 B. Plaintiff's Amended Motion (1) To Strike Objections to
21 Discovery; (2) To Compel Answers to Interrogatories and Responses to
22 Requests Production of Documents; (3) To Compel Designation of Witnesses
23 for Deposition Pursuant to Rule 30(b)(6); and (4) For Attorneys' Fees
24 and Sanctions (**Ct. Rec. 73**) and Defendant's Cross Motion for Protective
25 Order and Attorneys' Fees (**Ct. Rec. 101**) are **GRANTED AND DENIED IN PART**
26 as follows:

- 1) Plaintiff's request to strike Defendant's general objections is **DENIED**;
- 2) Plaintiff's request to strike Defendant's objections to RP Nos. 1-6, 11-19, 24, 26-27, 29-31, and 34-35 are **DENIED**;
- 3) Plaintiff's request to strike Defendant's objections to RP Nos. 7-10 are **GRANTED IN PART**; Defendant's protective order request with respect to RP Nos. 7-10 are **GRANTED IN PART**. Defendant shall produce the required material **no later than January 23, 2009**;
- 4) Plaintiff's request to strike Defendant's objections to RP Nos. 20-22, 25, & 32-33 are **DENIED**; Defendant's protective order request with respect RP Nos. 20-22, 25, & 32-33 are **GRANTED**;
- 5) Plaintiff's request to strike Defendant's objections to RP No. 23 is **GRANTED IN PART**; Defendant's protective order request with respect to RP No. 23 is **GRANTED IN PART**. Defendant shall produce the required material **no later than January 23, 2009**;
- 6) Plaintiff's request to strike Defendant's objections to RP No. 28 is **GRANTED**; Defendant's protective order request with respect to RP No. 28 is **DENIED**;
- 7) The parties are instructed to confer regarding what parts of Ms. Borth's individual deposition will be adopted by Defendant as binding under Rule 30(b)(6). Plaintiff is permitted a one (1) hour follow-up Rule 30(b)(6) deposition. Plaintiff is also permitted a one (1) hour

1 follow-up Rule 30(b)(6) deposition to cover all topics
2 Mr. Lintner was not able to answer.

3 8) The parties' attorney fee requests are **DENIED** because the
4 parties share equal responsibility in this discovery
5 dispute.

6 C. Plaintiff's Motion for Partial Summary Judgment (**Ct. Rec. 92**) is
7 **DENIED with leave to renew.** Plaintiff's motion is premature because
8 discovery is incomplete. Plaintiff is free to file the same dispositive
9 motion, or a more comprehensive dispositive motion, **after February 9,**
10 **2009.**

11 D. The new discovery cutoff date is **February 2, 2009.**

12 E. The Notice of To-Be-Adjudicated Claims and Affirmative Defenses
13 shall be filed and served no later than **February 9, 2009.**

14 F. All dispositive and *Daubert* motions shall be filed and served **no**
15 **later than February 13, 2009.**

16 G. All other deadlines in the Court's Amended Scheduling Order
17 (Ct. Rec. 57) remain.

18 **IT IS SO ORDERED.** The District Court Executive is directed to
19 enter this Order and to provide copies to counsel.

20 **DATED** this 23rd day of December 2008.

21 _____
22 s/ Edward F. Shea

23 EDWARD F. SHEA

24 United States District Judge

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